IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 82-5372

JACK MA,

Plaintiff-Appellant,

-vs-

THE COMMUNITY BANK,

Defendant-Appellee.

On Appeal from the United States Court of Appeals

for the Seventh Circuit

PRO SE JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

The following questions are presented for review by this appeal:

(I) Whether the U.S. Court of Appeals and the U.S. District Court were correct in reaching the issue of entitlement to damages before examining the question of liability based on fraud, bad faith and conversion of defendant-appellee and whether the U.S. Court of Appeals was correct in not remanding the case to the U.S. District Court after it (Court of Appeals) found considerable evidence of bad faith on the part of defendant-appellee and in not directing the District Court to consider the award of punitive damages based on bad faith, fraud and conversion?

Answered in the affirmative by both Courts.

(II) Whether the finding that plaintiff-appellant is not entitled to punitive damages in an action in which he is entitled to a finding of fraud, bad faith and conversion against defendant-appellee is the same as the granting of zero damages after a finding of

entitlement to damages resulting in precluding review on this issue pursuant to Wisconsin law?

Answered in the affirmative by the U.S. Court of Appeals.

(III) Whether the U.S. Court of Appeals and the U.S. District Court were correct in denying plaintiff-appellant legal fees and litigation costs and other compensatory and consequential damages where a defendant is found guilty of fraud and bad faith and caused a case to become extraordinarily lengthy due to defendant's obstinate refusal to cooperate with discovery?

Answered in the affirmative by both Courts.

(IV) Whether the U.S. Court of Appeals and the U.S. District Court abridged plaintiff-appellant's rights to choice of legal counsel in the absence of a showing that plaintiff's nonresident counsel needed to obtain assistance of local counsel and whether such an order was frivolous and unwarranted in light of the fact that the District Court did not order plaintiff-appellant to replace local counsel after she withdrew and whether the U.S. Court of Appeals erred in affirming the lower Court's application of Local Rule 2.04 to plaintiff-appellant when the rule specifically applied to nonresident counsel and not a pro se litigant?

Answered in the negative by both Courts.

(V) Whether exigent circumstances comprising of ineffective counsel by reason of a conflict of interest because of conspiracy with plaintiff-appellant's adversary is sufficient grounds for granting plaintiff's request for a jury trial where said request was not timely filed, especially where the defendant-appellee would not be unduly prejudiced?

Answered in the negative by the U.S. Court of Appeals and the U.S. District Court.

JURISDICTION

The final judgment and opinion of the U.S. Court of Appeals for the Seventh Circuit was entered on June 8, 1982, pursuant to 28 U.S.C.

Section 1332. The Notice of Appeal was filed on July 19, 1982 in the U.S. Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments V, VII and XIV.

STATEMENT OF THE CASE

On March 31, 1967, Jack Ma ("Ma") opened a savings account, #12398, with an initial deposit of $1,278.00 (Pl. Exh. #1), with the head teller of the defendant Bank, Mr. Gerald Gerbers ("Gerbers"). Gerbers observed Ma signing a signature card (Pl. Exh. #2), processed the account, approved the application, accepted the initial deposit and prepared the passbook.

Immediately following this transaction Ma asked Gerbers about a savings certificate of deposit ("SCD") and its safety (T.T., pp. 53 & 54) because of (1) Ma's concern in sharing a room in St. Norbert College's dormitory with another student whom he did not know and (2) the lack of locks on the drawers and closets in the room (T.T., p.54).

Ma asked Gerbers what Ma could do if the SCD were lost or stolen. Gerbers told Ma not to worry about that, since the SCD was non-negotiable (T.T., p.54). Gerbers also showed Ma a blank SCD, bearing the statement "NOT NEGOTIABLE" printed in bold face (T.T., p.55). Gerbers also stated that the Bank retained a copy of the SCD for its own records (T.T., p.55). If the SCD were lost or stolen, Ma should immediately report this to the Bank (T.T., pp.54 &55). Upon such notice, the Bank would automatically reissue a new SCD (T.T., p.55).

Gerbers also told Ma that he would earn higher interest on the SCD than he would on a regular passbook savings account (T.T., p.54). Gerbers explained that the SCD was a time deposit and that Ma could not touch the money except in an emergency; but that, in such event, he would not receive the same interest rate as indicated on the SCD.

but the interest rate would be adjusted to a regular passbook savings account. The SCD was automatically renewable up to three years. Relying upon Gerbers' representation, Ma purchased SCD #847 for $4,000 with an International Bank Draft he had brought with him from Australia (T.T., p.56).

For the next year and one-half, Ma continued to do business with The Community Bank, at that time known as Bank of West De Pere, and, in particular, with Gerry Gerbers. Not only did he continue to make deposits and withdrawals from his savings account, but he also purchased additional SCD's and opened a joint account with his brother, Edward Ma (Pl. Exh. #3). The additional SCD's, some of which were approved by Gerbers, all stated that they were NOT NEGOTIABLE and the Bank never informed Ma whether its reissuance procedure had changed from the time he purchased his original SCD's.

In September of 1968, Ma moved from Wisconsin to California to continue his education and notified the Bank by letter of his change of address (T.T., p.76). While in California, he purchased, by mail, three other SCD's #4464, 4465 and 4466, each in the sum of $10,000 (T.T., p.97). He also cashed a number of SCD's by mail and regularly received his interest checks from the Bank.

In September of 1971, Ma moved from California to New York City to pursue his graduate studies. On September 28, 1971, Ma's car was broken into and his two pieces of luggage were stolen (T.T., p.94). One of the pieces of luggage contained the three SCD's #4464, 4465 and 4466 (T.T., p.96). Ma immediately reported the theft, but the police records do not list the SCD's as one of the items stolen (T.T., p.98, Pl. Exh.#5). The next day, Ma called The Community Bank and asked to speak to Gerbers. Ma asked Gerbers if he recognized his voice. Gerbers said "Yes, Jack" (T.T., p.102). Ma told Gerbers of the loss of SCD's #4464, 4465 and 4466. Ma also explained that he had just moved to New York City and did not have a permanent address. Further, he told Gerbers to temporarily withhold his interest checks, coming due on October 9, 1971, until he notified Gerbers of his new

address. Gerbers said he would withhold the interest checks and that Ma should write to the Bank when he found an apartment, to make it formal (T.T., p.103). Gerbers assured Ma that new SCD's, together with the interest checks, would then be mailed to Ma.

On October 20, 1971, Ma sent a letter to the Bank, notifying it of the loss of the three SCD's and requesting that the interest checks and new SCD's be forwarded to him at his new address in New York City (Pl. Exh.#6). He also requested the Bank to notify the police to arrest the thief and contact him immediately, if the thief tried to cash the stolen SCD's. After receiving the letter, Gerbers issued an internal memorandum to all Bank employees respecting the three stolen SCD's and informed the Bank president (T.T., pp.692 & 686). The then Executive Vice President, Mr. James Mulva, then consulted with the Bank's attorney, Mr. William F. Morris, who suggested that Ma be required to furnish an indemnity bond of $50,000 before the Bank could reissue the SCD's and release Ma's interest checks due him (Pl.Exh.#8).

Attorney Morris was concerned about the negotiability of the SCD's and the identity of Jack Ma (Pl.Exh.#27). Ma refused to furnish such excessive bond of indemnity to the Bank (T.T., pp. 141, 60 & 61). The Bank already carried a blanket bond insuring against any loss that might be incurred through honoring a forged withdrawal of a SCD (Insuring Agreement D of Bankers Blanket Bond, Standard Form 24, Fidelity and Deposit Company of Maryland)(Pl.Exh.#25).

By letters dated January 25 and February 26 of 1972, Ma offered to personally come into the Bank and close the account, if this were necessary (Pl.Exh.#10 & 12). The Bank never accepted Ma's offer. On May 10, 1973, the Bank's attorney Morris mailed all the outdated interest checks to Ma at his New Jersey address, claiming that the Bank did not previously have Ma's address and therefore could not forward those interest checks to Ma (Pl.Exh.#13). Between September of 1971 and August of 1973, the Bank had stubbornly refused to be arbitrated by Federal and State Bank supervisory agencies who were

under request from Ma to have the Bank release his funds of $30,000 (T.T., pp.150, 151 & 152). Neither did the Bank turn over the $30,000 to the State or Federal Bank supervisory authorities to put it in an escrow account awaiting the identity of Jack Ma to be resolved. Attorney Morris testified at trial that Ma either had to furnish the Bank a security bond or obtain a judgment of a court directing the Bank to release such funds (T.T., p.562). On August 9, 1973, Ma commenced this action. Deposition of Jack Ma was taken by defendant Bank on January 14, 1976. On January 27, 1976, the defendant Bank moved to deposit $29,025.22 into the U.S. District Court claiming that it had no interest in said funds and that it still could not identify whether the plaintiff, Jack Ma, was its customer, the owner of the $30,000 SCD's. On February 13, 1976, Judge Myron L. Gordon ordered the $29,025.22 paid to the plaintiff.

This case was finally brought on for a court trial on liability on July 9, 1979. On July 25, 1980, the U.S. District Court entered its Memorandum and Order finding (1) the defendant Bank breached its contract with Ma in failing to immediately reissue the three SCD's at issue upon his notification that they were stolen; (2) the Bank fraudulently induced Ma to enter into a contract with it; and (3) the plaintiff is entitled to interest on the interest checks defendant wrongfully withheld, and dismissing Ma's claim against the Bank for the tort of bad faith. (reported at 494 F. Supp. 252) On November 5, 1980, the U.S. District Court held another trial on damages. On November 28, 1980, the District Court entered its Memorandum and Order dismissing all the damages issues Ma claimed against the Bank but awarded Ma $84.29 as interest upon interest checks which were wrongfully withheld from him by the Bank and all statutorily provided for costs (Appendix "B"). On September 16, 1981, Ma appealed to the U.S. Court of Appeals for the Seventh Circuit. On June 8, 1982, the U.S. Court of Appeals for the Seventh Circuit entered a final judgment and opinion (Appendix "A").

REASONS FOR REQUIRING REVIEW

(I) The U.S. Court of Appeals and the U.S. District Court Erred In Reaching The Issue of Entitlement to Damages Before Examining The Question of Liability Based On Fraud, Bad Faith And Conversion Of Defendant-Appellee And The Court Of Appeals Also Erred In Not Remanding The Case To The District Court After It (Court Of Appeals) Found Considerable Evidence Of Bad Faith On The Part Of Defendant-Appellee And In Not Directing The District Court To Consider The Award Of Punitive Damages Based On Bad Faith, Fraud And Conversion.

Plaintiff-appellant submits that it is a basic, fundamental error in logic for the U.S. Seventh Circuit Court of Appeals in its Opinion and Order dated June 8, 1982 (Appendix "A") and the U.S. District Court in its Memorandum and Order dated October 21, 1977 (Appendix "C") to reach the issue of entitlement to damages before examining the question of liability based on fraud, bad faith and conversion by defendant-appellee. Plaintiff-appellant further submits that he can find no federal courts in this country which deal with entitlement to damages prior to deciding the question of culpability. It cannot be justified in reason and/or in law. Such inversion in cause and effect in analyzing this case manisfestly ruins the merits of this case on appeal.

In its Memorandum and Order entered on October 21, 1977, the District Court dismissed Ma's claim for punitive damages for fraud in the inducement to contract, which in the instant case, relates to the Bank's fraud in inducing Ma to purchase SCD's from the Bank (Appendix "C", pp.8 & 9) and again in its Memorandum and Order entered on November 28, 1980 (Appendix "B", p.1). The Court's rejection of Ma's claim for punitive damages for fraud in the inducement was affirmed in the November 5, 1980 damage trial (T.T., p.893). The basis of the District Court's decision appears to be that the defendant Bank's conduct is not malicious towards plaintiff Ma.and therefore ruled that Ma was not entitled to punitive damages as a matter of law. But after the trial, the District Court found the defendant Bank liable for fraud in the inducement to contract

but still found Ma not entitled to punitive damages by adhering to his pre-trial decision. Plaintiff-appellant submits that in Jeffers v. Nysse, 98 Wis. 2d 543 (1980), the Wisconsin Supreme Court held that punitive damages are awardable without a showing of actual malice on a finding of fraudulent misrepresentation in the inducement to enter a contract, at 544, supra.

It is not enough that the Bank has returned to Ma his $30,000. Otherwise, the Bank not only has gotten away with making fraudulent statements to Ma (and likely, other customers as well), but also has by reason of such fraudulent statements, obtained the use of Ma's funds for five extra years (i.e., 1971 to 1976) while it refused to make good on its representation that new SCD's would be immediately issued to a customer upon notice of loss or theft. The Bank will have suffered no punishment nor would it be deterred from similar conduct in the future. The U.S. Seventh Circuit Court of Appeals also held that punitive damages were allowed in an action for fraud or deceit in Seifert v. Solem, 387 F.2d 925 (1967).

The Court of Appeals further erred in analyzing the tort claim of bad-faith breach of contract by basing its disposition on the damages issues in the beginning of its Opinion of June 8, 1982. However, the Court of Appeals did agree that Ma has introduced considerable evidence of the bank's bad faith and unreasonableness in support of his quest for punitive damages (Appendix "A", p.7). (Plaintiff-appellant has submitted about 20 pages of argument, based on fact and on law, in his appellate brief to the U.S. Seventh Circuit Court of Appeals proving defendant-appellee's bad faith conduct in this cause and does not intend to submit here unless this Court orders him to do so.) Accordingly, it should remand the case to the District Court directing it to consider the award of punitive damages based on bad faith (a cause of action added by oral amendment of the complaint at trial), fraud and conversion on the part of defendant-appellee. But it also failed to do so. These two major and obvious errors of the Court of Appeals ominously deprives justice to this appellant and is a violation of his constitutional rights under the Fifth and the Fourteenth Amendments.

(II) The Finding That Plaintiff-Appellant Is Not Entitled To Punitive Damages In An Action In Which He Is Entitled To A Finding Of Fraud, Bad Faith And Conversion Against Defendant-Appellee Is Not The Same As The Granting Of Zero Damages After A Finding Of Entitlement To Damages Resulting In Precluding Review On This Issue Pursuant To Wisconsin Law.

The Court of Appeals is incorrect in its finding that the question of punitive damages is not reviewable. The question of entitlement to punitive damages should be based upon a finding of the requisite conduct. Since the District Court refused to award punitive damages based upon its erroneous findings of lack of requisite conduct and later the erroneous finding of lack of bad faith, the matter should be remanded to the District Court to see what the decision on punitive damages would be if the court had made the findings on bad faith, fraud and conversion that the Court of Appeals agreed on.

Further, after hearing the facts the District Court found that defendant-appellee did act in fraudulently and denied appellant's entitlement to punitive damages. Appellant would not argue if the award was zero damages, i.e., that the damage done was nominal. This may not be reviewable. However, the finding of entitlement, not the amount, is clearly not the same thing and is therefore reviewable.

Plaintiff-appellant would not dispute the reviewability of punitive damages made after a review of the facts and a correct finding. But where as in this case a finding of lack of entitlement to punitive damages was made without reviewing the facts and then again after an erroneous finding of lack of bad faith, appellant strongly urges that the question of punitive damages is reviewable.

(III) The U.S. Court Of Appeals And The U.S. District Court Erred In Denying Plaintiff-Appellant Legal Fees and Litigation Expenses And Other Compensatory And Consequential Damages Where The Defendant Was Found Guilty Of Fraud And Bad Faith And Caused A Case To Become Extraordinarily Lengthy Due To Defendant's Obstinate Refusal To Cooperate With Discovery.

Plaintiff-appellant submits that the U.S. Seventh Circuit Court of Appeals erred in interpreting the grounds which appellant demands attorneys' fees and litigation expenses. Appellant's argument is based upon the "bad faith" doctrine in which a series of Supreme Court and Court of Appeals cases, such as Hall v. Cole, 412 U.S. 1, 15, 93 S. Ct. 1943, 1951, 36 L.Ed 2d 702 (1973); Vaughn v. Atkinson, 369 U.S. 527, 82 S.CT. 997, 8 L.Ed 2d 88 (1962); and Rolax v. Atlantic Coast Line Railroad, 186 F.2d 473 (4th Cir., 1951), did assess attorneys' fees against defendant whose prelitigation conduct left plaintiff no alternative but litigation, despite defendant's duty to deal fairly with plaintiff. Plaintiff-appellant bases his claim for attorneys' fees upon the American Rule's bad faith exception. Plaintiff-appellant contends that bad faith or oppressive conduct which is the basis for the cause of action is ground for an award of attorneys' fees under this exception. Straub v. Vaisman & Co., Inc. 540 F.2d 591 (3rd Cir., 1976).

The most recent Supreme Court case is Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed 2d 488 (1980), in which the Court stated:

> "The bad faith exception for the award of attorneys' fees is not restricted to cases where the action is filed in bad faith. 'Bad faith' may be found, not only in the actions which led to the lawsuit, but also in the conduct of the litigation." (Citation omitted)

Plaintiff-appellant has proved the defendant's outrageous conduct constitutes bad faith which necessitates the expense of this litigation. This bad faith forms a valid basis for the granting of attorneys' fees. Further, upon a finding of bad faith of the defendant bank by the U.S. Seventh Circuit Court of Appeals prior to and in the course of the litigation, assessment of attorneys' fees and litigation expenses against the defendant would be appropriate.

Further, in 6 Moore Federal Practice, paragragh 54.77(2) at 1705, Moore stated that the allowance of attorney's fees is subject to the exception or qualification:

> "the equitable power to make an additional allowance, including counsel fees, although, as we shall see, this power is mainly exercised in cases involving a "fund", but it is, nevertheless, sufficiently extensive to authorize an award of counsel fees in other cases and against a party."

In Hall v. Cole, supra, this Court held that the federal court was permitted to

> "award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" (Emphasis supplied)

In Bolax v. Atlantic Coast Line Railroad Co., supra, Judge Parker stated:

> "Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization (in this case, the Community Bank) which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge." (Emphasis supplied)

Further,

> "Where the wrong is of such character that the proper protection of his rights requires plaintiff to employ counsel to gain redress, it has been held that plaintiff may recover reasonable counsel fees as an element of damage." C.J.S. 2d Section 50(a) at p. 781

Defendant Bank's attorney William F. Norris testified at trial that if Ma wanted his funds released from the Bank he should go to the Court having jurisdiction over the Bank to seek a judgment ordering the Bank to release his monies. Clearly, plaintiff-appellant was compelled and oppressed in this litigation with such small means that he could not even find employment to finance this litigation;

and finally, when he had exhausted all his savings, he had to discharge his attorneys and take over this case by himself; and it took him more than a decade and aggravation to fight this case, notwithstanding his never having received any legal training. Therefore, justice requires that attorneys' fees and litigation expenses must be awarded to appellant in this case and the Court of Appeals should remand the case to the District Court for assessment of these costs. Attorney fees are similar to punitive damages in that they are in addition to consequential damages. Since the Court below said that plaintiff was not entitled to punitive damages due to incorrect reasoning, and the same reasoning is applied to the decision to not award attorneys' fees, then this too should be reversed.

Further, in Baker v. Northwestern National Casualty Co., 26 Wis 2d 306 (1965) and in Cedarburg L. & W. Comm. v. Glen Falls Ins. Co., 42 Wis.2d 120, 124-125 (1969), it has been held that attorney's fees are awardable when a plaintiff incurs attorney's fees in a litigation with a third party if the defendant's breach of contract has caused the third party to sue the plaintiff. The theory is premised on the belief that the fees incurred by the plaintiff for defending the third party litigation should be assessed against the defendant because he caused it.

In the case Hazelwood v. Ma, ...#C89-972 in the Milwaukee County Circuit Court, Attorney Hazelwood of the law firm of Quarles & Brady of Milwaukee, Wisconsin sued Ma for legal services rendered because Ma requested Hazelwood and his law firm to assist him in the return of his $30,000 from the defendant Bank. Ma had to retain New York counsel to defend such third party litigation but, finally, was found liable to Hazelwood for legal services rendered. Therefore, attorneys fees and litigation expenses should be assessed against the defendant Bank for its breach of contract with plaintiff.

Finally, plaintiff-appellant wishes to point out that the Court of Appeals erred in finding that appellant failed to introduce

adequate evidence of consequential and compensatory damages and was not prevented from discovering the unjust enrichment of defendant Bank of its wrongful retaining appellant's funds. During the damage trial, plaintiff-appellant did introduce his damages as Plaintiff Damage Exhibit #1. The Court of Appeals apparantly ignored this document and did not review it. Secondly, during the damage trial on November 5, 1980, plaintiff-appellant did subpoena the defendant Bank's president, Wayne Delorne, to testify, inter alia, the unjust enrichment of its wrongful retaining appellant's funds. But District Court Judge Warren granted defendant's motion to quash the subpoena duces tecum submitted in his chamber without giving an opportunity for the plaintiff to answer (T.T., p.872). Accordingly, appellant was prevented from discovering such evidence and from introducing it at trial. This is only one instance showing why this case become extraordinarily lengthy due to defendant's obstinate refusal to cooperate with discovery and the district court's unwarranted prohibition of plaintiff from introducing expert testimony to prove his damages. Therefore, the Court of Appeals erred in concluding that plaintiff-appellant failed to introduce evidence of his damages at trial.

(IV) The U.S. Court Of Appeals And The U.S. District Court Abridged Plaintiff-Appellant's Rights To Choice Of Legal Counsel In the Absence Of A Showing That Plaintiff's Nonresident Counsel Needed To Obtain Assistance Of Local Counsel And Such An Order Was Frivolous And Unwarranted In Light Of The Fact That The District Court Did Not Order Plaintiff-Appellant To Replace Local Counsel After She Withdrew And The Court Of Appeals Erred In Affirming The Lower Court's Application Of Local Rule 2.04 To Plaintiff-Appellant When The Rule Specifically Applies To Nonresident Counsel.

It is respectfully submitted that the U.S. District Court's Order of July 29, 1976 (Appendix "D") is fatally defective because it directs the plaintiff-appellant, rather than his attorney, to obtain Wisconsin local counsel. The first sentence of the Order

recites that defendant made a motion for an order "requiring the plaintiff to obtain local counsel under local rule 2.04." (Emphasis supplied). It is respectfully submitted that under 28 U.S.C. Section 1654, the District Court, while it is given a certain discretion to decide which attorneys may represent parties before it, cannot direct a plaintiff who is a natural person to obtain counsel of any kind. Title 28, U.S.C. Section 1654 provides:

> In all courts of the United States parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Thus, the plaintiff-appellant has a federal statutory right to appear personally and cannot be directed by the court to obtain any attorney at all. This is probably the reason why local rule 2.04 is directed to nonresident attorneys rather than to parties:

> Section 2.04 Local Counsel
> At any time, upon its own motion, the court may require that a nonresident attorney obtain counsel to assist in the conduct of the case. (Emphasis supplied)

The Order is invalid for the further reason that it was not made on the court's own motion as required by local rule 2.04, but upon motion of the defendant.

The very first sentence of the Order appealed from succinctly states both reasons why the Order is invalid on its face: "The defendant has moved for an order requiring the plaintiff to appoint local counsel under local rule 2.04."(Emphasis supplied) The third paragraph of the Order states that: "The defendant's motion is granted ....." The facial invalidity of the Order is obvious. Nowhere is there provision for the defendant making a motion in this matter.

It should be noted that since February, 1975, the plaintiff-appellant's New York attorney, David C. Buxbaum, had been admitted to practice before the U.S. District Court for the Eastern District of Wisconsin, before the U.S. Court of Appeals for the Seventh Circuit as well as the U.S. Supreme Court.

It is respectfully submitted that provision for local counsel

required by local rule 2.04 of the Rules of the U.S. District Court for the Eastern District of Wisconsin is in violation of the U.S. Constitution. It is in violation of the due process clause of the Fifth Amendment as well as the due process and equal protection clauses of the Fourteenth Amendment granted to the plaintiff-appellant by the United States Constitution. If a litigant has an attorney who is admitted to practice before the Court of the Eastern District of Wisconsin, there are no grounds for delimiting the ability of that attorney to appear before the Court. Nothing in the admission of David C. Buxbaum, counsel to Ma in this action, delimited his right to appear or admitted him specially with certain burdens upon his appearance at a later stage of the case. To impose an additional burden on counsel for Ma would be unreasonable and unfair and in violation of Ma's constitutional rights to have counsel of his own choosing.

Even if the Order had been facially valid (directed to plaintiff-appellant's attorney and made on the Court's own motion), it was an abuse of discretion, because no reason justifying the requirement of local counsel in this case has been adduced.

The District Court gave no reason for its decision, except to say in its Order that it had examined the motion papers and believed it was "amply advised in the premises." Therefore, the reason for the District Court's exercise of discretionary authority must be found in those motion papers. A careful review of the record shows that the defendant's motion in requiring Ma to obtain local counsel is merely a strategy of gamesmanship in litigation and a harassment on Ma and creates further financial burden to Ma. The record also shows that local counsel did practically nothing in this case and served no useful purpose to Ma. Such an Order was frivolous and unwarranted in light of the fact that the District Court did not order plaintiff-appellant to replace local counsel after she withdrew from the case.

The Order of the District Court, in addition to being arbitrary and unsupported by any showing of need for local counsel, was an

abuse of discretion for the further reason that it would prejudice the plaintiff-appellant by interfering with his representation of the case. The plaintiff-appellant, after having consulted with seven Wisconsin law firms prior to bringing this action, was finally forced to seek New York counsel to assist him, only because of the apparent disinclination of any of the Wisconsin law firms, and particularly the law firm of Quarles & Brady, to seriously pursue Ma's interest in this case. Ma feels that a nonresident attorney is far more likely to represent him vigorously because such attorney is not subject to the pressures of remaining politically and socially acceptable in the State of Wisconsin. He is not afraid to accuse a local banking institution of wrongdoing, and is not subject to any possible ostracism from local residents that would result from representing an Oriental in an unpopular case, the outcome of which would reflect unfavorably upon a local banking institution.

Thus, the District Court's Order interferes very seriously with the attorney-client relationship, and threatens to gravely undermine Ma's chances of obtaining justice. The District Court with no valid reason, had ordered that an intermediary be placed between the New York attorney and the Court, aside from burdening Ma's financial condition in view of the fact that he is an indigent person.

Plaintiff-appellant respectfully submits that the Court of Appeals erred in logic in concluding the issue of local counsel in this case. When it ultimately agrees with appellant that local counsel did absolutely nothing in this case, it fails to consider why a local counsel is needed in this case in the beginning and it naturally leads to depriving Ma's rights if such local counsel's service is not needed.

For these reasons, it is respectfully urged that the Order of July 29, 1976 appealed from is invalid on its face, and must be reversed and this Court should remand this issue to the District Court and direct it to award appellant local counsel's fees and costs and disbursements and the harassment caused to Ma and such other and further relief this Court may seem just and proper.

(V) Exigent Circumstances Comprising Of Ineffective Counsel By Reason Of A Conflict Of Interest Because Of Conspiracy With Plaintiff-Appellant's Adversary Is Sufficient Grounds For Granting Plaintiff's Request For A Jury Trial Where Said Request Was Not Timely Filed, Especially Where The Defendant-Appellee Would Not Be Unduly Prejudiced.

In its Memorandum and Order dated October 21, 1977 (Appendix "C"), the District Court refused to grant Ma's demand for a jury trial in this case on the grounds that such demand was untimely.

Plaintiff-appellant submits that the untimeliness of his demand for a jury trial in this case was caused by his original attorneys, John A. Hazelwood, David E. Jarvis and their law firm, Quarles & Brady, due to their conflict of interest in simultaneously representing Ma and the parent corporation of The Community Bank, The First National Corporation of Appleton, Wisconsin. Ma's original attorneys wanted to dispose of this case on summary judgment based upon stipulated facts, and never intended to have this case go to trial, so that they could cover up for, and not offend, their larger client, The First National Corp. and its affiliate, The Community Bank, the defendant in this case. Therefore, they never informed Ma of his constitutional rights to a jury trial and did not demand a jury trial when preparing Ma's Complaint.

Plaintiff-appellant submits that the holding of the United States Supreme Court and various federal courts indicate that there must be an intentional, or voluntary waiver, by a plaintiff before Rule 38(d) o the Federal Rules of Civil Procedure should be used to foreclose a plaintiff from having trial by jury. And certainly in this case, because of Quarles & Brady's conflict of interest, Ma made no intentional waiver of his right to trial by jury because he was never informed of his right to have such a trial.

The U.S. Supreme Court has stated that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 811, 81 L.Ed. 1177 (1937)(Emphasis supplied). Other

Supreme Court cases containing similar statements are Hodges v. Easton, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882); Slocum v. New York Life Ins. Co., 228 U.S. 364, 385, 33 S.Ct. 523, 57 L.Ed. 879, Ann. Cas. 1914D, 1029 (1913); Patton v. United States, 281 U.S. 276, 312, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263 (1930); Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 95 A.L.R. 1150 (1935); Foust v. Munson S.S. Line, 299 U.S. 77, 84, 57 S.Ct. 90, 81 L.Ed. 49 (1936). This famous statement from the Aetna case has often been cited by courts in granting a jury trial after technical waiver under Rule 38(d). Many cases suggest that an intentional or voluntary waiver requirement should be read into this rule. In Kerschenbaum v. Wool, 13 F.R.D. 333 (D.C.D.C. 1952), the court stated that a late demand for a jury trial would be recognized because it had not been opposed for two years after it was served, and because the court would indulge a presumption against waiver of jury trial (citing Aetna). In Paper Stylists, Inc. v. Fitchburg Paper Co., 9 F.R.D. 4 (N.D.N.Y. 1949), the plaintiff failed to serve a jury demand until it served a note of issue upon the defendant, calling for trial less than one month later. The court cited as among its reasons for ordering a jury trial:

> "the importance of the right to seek trial by jury. Blackstone said that trial by jury is the glory of the law. It is my thought that the right to seek the glory should not be hampered by unreasonable obstacles." (citing Aetna) 9 F.R.D. 4, 5.

See also Container Co. v. Carpenter Container Corp., 9 F.R.D. 261 (D.C. Del. 1949).

It is respectfully urged that the U.S. Supreme Court would, if it ruled on the point, quite likely hold that waiver of the right to a jury trial in a civil case is only effective if it is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 84 L.Ed. 1461 (1938), following its holdings in the criminal cases, and the great principle announced in Aetna, that "as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."

Where a party desiring a jury trial has been held to have waived his right to same under Rule 38(d), the question of whether a jury trial will be ordered is left by Rule 39(b) to the discretion of the court.

In Swofford v. B. & W., Inc., 336 F.2d 406 (5th Cir., 1964), cert. den. 85 S.Ct. 653, 379 U.S. 962, 13 L.Ed. 2d 557, the court announced that it was basing its decision upon the principle that the right to a jury trial in a federal court as declared by the Seventh Amendment is a basic and fundamental feature of our system. It may be safely stated that at English common law, Ma in this action, for the return of monies on deposit with the Bank, and for damages for wrongful withholding thereof, would have been entitled to a jury trial as of right.

Ma believes that the judicial system of this country will bring him justice in the form of damages for the deprivation of his assets by the Bank without due process. He has learned, and believes, that trial by jury is the cornerstone of the Anglo-American judicial system in which he has such confidence. For these reasons, it is undeniable that it never entered Ma's mind to waive a jury trial, and that if the option of a trial without a jury had been made to him he would have refused categorically. It is respectfully submitted that the court should recognize a presumption against waiver of any important constitutional right, and that where, as here, it is coupled with the party's undeniable intent throughout the litigation that his case ultimately be resolved by a jury, the waiver provision of Rule 38(d) is not operative.

The judicial discretion permitted in determining whether or not to grant relief from waiver under Rule 39(b) is not synonymous with judicial whim or caprice. 5 Moore's Federal Practice, paragraph 39.09. Where such relief has been granted, the courts have generally found it to be appropriate because of some special circumstances surrounding the failure to make timely demand for a jury trial or have relied on other factors.

In Peterson v. Southern Pacific Co., 31 F. Supp. 29 (S.D.Cal. 1940), the court, in granting a motion for relief from waiver, deemed it a very important circumstance that the moving party's actions showed no intent to waive its right to trial by jury. Ma never intended to waive his right to trial by jury. Beyond that, it is undeniable that Ma affirmatively intended to have a trial, and to have a trial by jury. The denial of a constitutional right to a litigant so firmly intent on availing himself of it would be contrary to the spirit of the Rules and to the traditions of American Jurisprudence, especially where the defendant would not be unduly prejudiced.

In placing the jury trial waiver trap in the Rules, which are in most other respects a decided step away from technicality and gamesmanship in litigation, the drafters and the Supreme Court uncharacteristically created a new technicality. Fortunately, they provided a safety valve in Rule 39(b), of which the Court ought to avail itself in the interest of justice.

Many opinions indicate that the court will be more liberal in granting relief from waiver where the issues are predominently factual, and readily susceptible to trial by jury. Bosley v. Southern Bell Telephone and Telegraph Co., 1 F.R.D. 771 (W.D.La., 1941); Bowles v. Samonas, 7 F.R.D. 104 (W.D.Pa., 1946); Previn v. Barell, 14 F.R.D. 466 (E.D.N.Y., 1953); Washington County Ins. Co. v. Wilkinson, 19 F.R.D. 177 (D. Md., 1956); Marrero v. Continental Cas. Co., 48 F.R.D. 394 (D.P.R., 1969). Factual issues predominate over legal issues in this case, and these factual issues are readily susceptible of decision by jury.

Therefore, plaintiff-appellant's demand for a trial by jury in this case should be granted and the District Court's Decision on May 20, 1976 and again on October 21, 1977 should be reversed.

SUMMARY OF REBUTTAL

The right of the courts to dismiss a cause of action is not challenged by plaintiff-appellant. What is challenged are the reasons

and the logic the Court of Appeals and the District Court approach in analyzing and concluding this case. The reasoning applied in this case is so irrational that it must leave one to conclude that there is an intent to deprive plaintiff-appellant of justice.

CONCLUSION

For all the foregoing reasons, plaintiff-appellant respectfully requests that his appeal be reviewed by this Court and the case be remanded to the U.S. District Court for the Eastern District of Wisconsin for a re-trial before a twelve-man jury to consider the award of punitive damages based on fraud, bad faith and conversion on the part of the defendant-appellee and other compensatory and consequential damages and that this Court award appellant legal fees and litigation expenses, costs and disbursements of this appeal and such other and further relief as this Court may seem just and proper.

Respectfully submitted,

Jack Ma

Jack Ma
Plaintiff-appellant, Pro Se